

No. 14682

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

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MATTIE EDENS MEDIGOVICH,

*Appellant,*

*vs.*

PACIFIC MUTUAL LIFE  
INSURANCE COMPANY,

*Appellee.*

*Appeal from the United  
States District Court for  
the District of Arizona*

**APPELLANT'S OPENING BRIEF**

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## APPELLANT'S OPENING BRIEF

### JURISDICTION

The above entitled proceeding arises upon an appeal from a judgment entered in an action by Mattie E. Medigovich, the appellant beneficiary, against the Pacific Mutual Insurance Company, a corporation, to recover the sum of \$5,000 under a contract of employee group insurance issued by the appellee, Pacific Mutual Insurance Company.

The amount in controversy exceeds \$3,000 exclusive of interest and costs. The jurisdiction of the District Court rests upon diversity of citizenship. 28 U.S.C. Sec. 1332(a)(b).

The action was tried by the District Court sitting without a jury on the complaint (R 6) and answer thereto (R 8).

The District Court ordered entry of a judgment in favor of the Pacific Mutual Insurance Company and against Mattie E. Medigovich (R 11) and the judgment from which appeal has been taken was entered on December 30, 1954 (R 12).

The judgment being final, the present appeal is predicated upon 28 U.S.C. Sec. 1291.

### **STATEMENT OF THE CASE**

On the 3rd day of July, 1952, the appellee, the Pacific Mutual Insurance Company, issued a certificate of insurance under a master group life insurance policy upon the life of Joan E. Medigovich (R 25). Under said contract of insurance, the insurance company agreed to pay to the beneficiary, the appellant, Mattie E. Medigovich, the sum of \$5,000 if said Joan E. Medigovich died during the effective date and term thereof (Plaintiff's exhibit 3 in evidence). On January 23, 1953, seventeen year-old Joan took her life, apparently as a result of some temporary and tragic indisposition.

The contract of insurance was not between the insurance company and the employer of Joan E. Medigovich, but between the insurance company and a trustee for the Arizona Retail Lumber and Building Association trust fund (Plaintiff's Exhibit 1 in evidence, see R 32). The master policy was executed on the 3rd day of October, 1950, and was issued to the trustee for said association (Plaintiff's Exhibit 1 in evidence, see R 25, 26). The policy undertook to insure certain classes of employees of subscribing employers who were members of the association (Plaintiff's Exhibit 1 in evidence). The Cottonwood Lumber Company, a partnership, was a member of said association (R 24) and had been a qualified subscribing employer from the initiation of said group plan (R 34). Joan was a partner of said Cottonwood Lumber Co. (R 48, 57, 58).

While designed and worded for the true employer-employee

status, the policy additionally extended coverage to partners and sole proprietors by the following language:

"If any of the subscribing employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship, the individual proprietor thereof shall be considered an employee on the same terms as those applicable to partners of a partnership." (Page 3, clause 4 of Master Policy, Plaintiff's Exhibit 1 in evidence).

The certificate of insurance issued on Joan E. Medigovich's life did not contain the above provision, nor did it contain any provision or provisions relating to or describing the activity of a partner to qualify as an employee under the terms of the policy (See Plaintiff's Exhibit 3 in evidence).

Some several months prior to the issuance of said certificate on Joan's life on July 3, 1952, Joan and her brother Billy Medigovich, aged thirteen, had filed applications as partners of the subscribing employer, the Cottonwood Lumber Company, and the trustee of the association accepted said applications, determined the premium contributions and issued the certificates (R 25, 37, 38). At this time the Cottonwood Lumber Company was a co-partnership composed of Mattie E. Medigovich, the appellant, Mike Medigovich, her husband, and their two children, Joan and Billy (R 48, 57, 58).

From its inception, the Cottonwood Lumber Company had been a family enterprise. The business had its birth and early growth with the appellant's father, W. F. Edens, under whose tutelage the appellant, Mattie E. Medigovich had grown up in the business (R 56). Then followed a family partnership consisting of the father, Mattie and her husband, Mike (R 57). In 1951 when the father retired from part ownership, a partnership of Mattie, Mike and Mattie's brother, J. F. Edens, was formed (R 57). Finally, in March of 1952, upon the withdrawal of J. F. Edens from the partnership, another family partnership was formed, composed as heretofore stated, of Mattie, Mike, Joan and Billy Medigovich

(R 57, 58); that in this connection, both Joan and her brother Billy contributed approximately \$10,000 each to the partnership, and it was contemplated under the partnership agreement that they would participate in the partnership activities within the limitations of their age and experience, when not engaged in schooling and other youth activities (R 48, 49, 85).

The nature and extent of Joan's activities in the partnership business included keeping of the partnership records, waiting on customers, taking charge of the company office when Mattie and Mike were away from the business, and appearances at retail lumber conventions as a partner; that on several occasions suggestions by Joan with respect to remodeling the store and use of new merchandising techniques were adopted by the partnership (R 59, 60, 61); that during her final high school term, Joan would work at the company office after getting home from school and on numerous occasions would also work in the evenings as well as Saturdays (R 60, 68, 71, 73, 77, 81); that during the summer months she would generally average a half of a day in the partnership business (R 76, 77, 80); that from about the 29th of September 1952 to the middle of November 1952, while Joan was attending Stanford University, the appellant was in constant communication with Joan by telephone and letters and advised and consulted with Joan with regard to partnership transactions and business (R 62, 63).

It was a matter of common knowledge in the community that Joan was a partner in the Cottonwood Lumber Company (R 88, 89, 90, 93, 98). Income tax returns were filed for Joan as a partner in the company (R 50) and a status report was filed with the Employment Security Commission identifying Joan as a partner (R 43, 44, 45). Additionally, the financial statements at the Cottonwood Bank identified Joan as a partner (R 96).

After returning from Stanford University, some time in the latter part of November, she was hospitalized for a week and then returned to the company business, where she resumed her former activities until her enrollment at Arizona State College (R 63, 64,

74, 75). It was contemplated, however, that while attending said college she would spend some time in the business on weekends (R 64). It was just shortly after her enrollment at the Arizona State College that Joan took her life.

Under a provision of the master policy entitled "TERMINATION OF AN EMPLOYEE'S INSURANCE" it is stated:

"(a) The insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment . . . " (See page 3a of master policy, Plaintiff's Exhibit 1 in evidence).

The District Court, while finding that Joan E. Medigovich was actively engaged in the business of the Cottonwood Lumber Company, from the issuance of the certificate July 3, 1952, up until her departure for Stanford University on or about September 17, 1952, found that there was a termination of her employment as an active partner in the Cottonwood Lumber Company partnership business as of the date of said departure and that accordingly her insurance terminated thirty-one days thereafter (R 11).

### **SPECIFICATION OF ERRORS RELIED UPON**

1. The District Court erred in finding that there was a complete severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company copartnership and Joan E. Medigovich, the insured, on or about September 17, 1952, under the terms of the group policy and Certificate No. 266 issued thereunder.

2. The District Court erred in not resolving against the appellee insurer and in favor of the insured the manifest ambiguities created by language of the group policy which purported to apply the relationship, activities and duties of an employer-employee status to that of a partnership-partner status.

3. The District Court erred in not finding that an acceptance of premiums by the appellee insurer with knowledge of the insured's employment character constituted an estoppel to assert

that the status existing at the time of death was not that of employee under the terms of the group policy No. GL2208 and Certificate No. 266 issued thereunder.

4. The District Court erred in not finding that the insured was at all times from on or about Sept. 17, 1952, up until the insured's death on January 23, 1953, a full-time employee, temporarily working on a part-time basis within the terms and provisions of the group policy and certificate issued thereunder.

### SUMMARY OF ARGUMENT

1. The conclusion of the District Court that there was a severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company copartnership and Joan E. Medigovich, partner, on or about September 17, 1952, under the contract of insurance was premised on a basic error of law. The basic error of law underlying the decision below is that when Joan E. Medigovich left the partnership business for the purpose of schooling at Stanford University and the circumstances were such that she was constantly consulted with respect to partnership transactions (R 63) and continued to draw partnership dividends (R 63) and continued her status as a general partner, with its attendant rights, liabilities and duties, that she thereby necessarily became a dormant or silent partner as distinguished from an active partner in the partnership business.

2. The conclusion of the District Court that on Joan's departure for Stanford University she thereby ceased to be actively engaged in the partnership business and that her insurance terminated thirty-one days thereafter, ignores the manifest ambiguities created by the policy language.

The language of the master policy and of the certificate was prepared by the insurer and contained the standard provisions adapted to the employer-employee relationship. In applying the provisions relating to activity and to termination of employment to the status of a partner or proprietor, it is quite apparent that language designed for the employee status will create ambiguities

when applied to the others. The activity qualifying the one as active within his status, would not necessarily qualify or disqualify the other as being active within his status. The degree of formality surrounding a leave of absence for the one would be quite dissimilar to the other. The failure of the District Court to resolve these ambiguities against the insurer and in favor of the insured was a basic error of law under the evidence of record, and an unjustifiably technical construction of the policy provisions.

3. The insurance company was apprised of the ages of both Joan and her brother Billy (R 41, 42) and would certainly be aware that their employment character as partners in the Cottonwood Lumber Company would necessarily be limited by their years, their experience and their activities devoted to schooling and other functions. The insurance company nevertheless accepted premiums on behalf of Joan E. Medigovich up to the date of her death on January 23, 1953, and on behalf of her brother Billy Medigovich up to the date of this action (R 38). By its acceptance of premiums and with knowledge of Joan's employment or partnership character, the insurance company is estopped to assert that the status existing at the time of death was not that of employee under the terms of the group policy No. GL 2208 and Certificate No. 266 issued thereunder.

4. On page 3 of the master policy under "INSURANCE SCHEDULE" the policy provides as follows:

"The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer determined by conditions pertaining to employment as are reported in writing to the insurance company by the trustee, provided, however, that part-time employees (but not including full-time employees temporarily working on a part-time basis) shall not be eligible for insurance hereunder." (Plaintiff's Exhibit 1 in evidence)

The conclusion of the District Court in finding that Joan E. Medigovich was an active partner up until September 17, 1952,

and that there was a termination thirty-one days thereafter within the terms of the insurance contract, must be premised on the court's determination that there was a change of employment character as of that date.

The District Court failed to consider that with the premium having been paid, Joan was in fact eligible as of September 17 and thereafter as a full-time employee, temporarily working on a part-time basis within the meaning of the above provision.

### ARGUMENT

*The record clearly establishes that at all times from the issuance of the certificate on Joan E. Medigovich until her death, Joan was an active partner in the partnership business of her subscribing employer, the Cottonwood Lumber Co.*

The insurance company chose to extend coverage under its group policy to partners and proprietors. Only in the master policy, page 3 thereof, *but not in the certificate*, does the insurer employ language wherein it attempts to describe the requisite attributes of eligibility for these two classifications:

"If any of the subscribing employers is a partnership the partners thereof shall be considered employees within the meaning of this policy if and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship the individual proprietor thereof shall be considered an employee on the same terms as those applicable to partners of a partnership." (Plaintiff's Exhibit 1 in evidence)

At the bottom of page 3 headed "INSURANCE TABLE" and subheaded "CLASSIFICATIONS", the policy permits *active partners*, proprietors and officers of member firms to be insured in the amount of \$5,000 without regard to weekly earnings as is the case with all other eligible employees.

Can it be said from a reading of the above provisions that the insurer has unambiguously spelled out the conduct or activity necessary on the part of either of these two classes?

Certainly the mere fact that the insurer in its preparation of

the policy terms and provisions designates partners and proprietors as employees does not in fact or in law change the status of these two classes so as to make them true employees. There can be little quarrel with the proposition that a proprietor or partner could devote far less time to his business and still be actively engaged in his business.

There is no measuring stick of activity for partners or proprietors. We do not know, from a fair reading of the policy, just how little or how much the partner or proprietor must be about his business. The policy does not require that the employee-partner be a managing partner, but seemingly permits coverage to extend to a general partner, who is an active partner as distinguished from a silent or dormant partner.

When Joan departed for Stanford, she certainly did not sever her relationship with the subscribing employer, the Cottonwood Lumber Company. She remained a general partner, with its attendant rights and liabilities. She continued to be a part owner of the business, drawing partnership dividends, and was regularly consulted by the appellant with regard to partnership business and transactions (R 63).

From September 27th until her death on January 23rd, Joan was certainly not as actively engaged in the partnership business as she was before her departure, but did she entirely cease her activity as a partner in the partnership business so as to become a dormant partner? Let us examine the record for evidence of the conduct of the employer, the Cottonwood Lumber Company, and the employee (partner) Joan E. Medigovich in this regard. The appellant testified:

"Q. When did Joan leave for Stanford?

"A. About the 27th of September.

"Q. When did she return?

"A. November 14th or 15th.

"Q. She was gone something over six weeks?

- "A. Maybe the 16th. Something over or about six weeks.
- "Q. During that period of time did you have occasion to correspond with her?
- "A. Every day.
- "Q. Did she answer your letters with respect to business matters particularly?
- "A. Yes, sir.
- "Q. Did you have occasion during that period of time or did the partnership to acquire some additional partnership property?
- "A. Yes, sir.
- "Q. What was that?
- "A. Sedona Lumber Company.
- "Q. Was that question of buying that additional business discussed with Joan by letters?
- "A. Yes, it certainly was; on the telephone and letters.
- "Q. You called her up and talked to her about it?
- "A. Yes, sir.
- "Q. Did you consistently during the entire time she was there keep her informed as to the partnership business affairs?
- "A. Yes, Sir.
- "Q. During that period of time did she continue to draw or was she entitled to go ahead drawing a portion of the partnership profit?
- "A. Yes, sir.
- "Q. I believe she did then return in the middle of November?
- "A. Yes.
- "Q. And stayed in Cottonwood about until January?
- "A. About the 19th of January. Or about the 20th of January, excuse me.

"Q. Pardon me?

"A. After the 20th of January.

"Q. What did she do in the business during that period of time?

"A. She wrote receipts. Went back to her old job, helped with the statements. We had lots to do around Christmas. Had to get all our customer gifts and customer cards, and she made bank deposits.

"Q. I take it during that period of time she was practically full time in the business?

"A. Yes, sir.

"Q. Then when she went to Tempe, Mrs. Medigovich, I believe you felt that because of the closeness of Tempe to Cottonwood, she would practically spend most every week end at home?

"A. We intended for her to spend every week end at home.

"Q. In that period of time did she resume her old job in the business?

"A. Yes, sir.

"Q. Over the week ends?

"A. Yes, sir." (R 62-64)

A "dormant partner" as defined by the cases set forth in 13 *Words and Phrases*, page 330-332, is one whose connection with the partnership business is concealed and one who does not take any active part in it. The above language was used by the Wyoming Supreme Court, citing 20 *R.C.L.* 834, in the oft cited case of *Dinkelspeel vs. Lewis*, 62 P. 2d 294, 298, 50 Wyo. 380, (1936); see also the definition that a "dormant partner" is one who takes no part in the business, and whose connection with it is unknown. Both secrecy and inactivity are implied thereby. Citing *National Bank of Salem vs. Thomas*, 47 N.Y. 15, 19; citing *Pars. Partn.* 33; *Winship vs. Bank of United States*, 30 U.S. (5 Pet.) 573, 8 Law Ed. 216.

It can hardly be claimed that Joan was a silent or dormant

partner when the record establishes Joan was well known in the community as a partner in the Cottonwood Lumber Company (R 88, 89, 90, 93, 98) and that both before and after her schooling period at Stanford, she worked around the business offices of the partnership (R 59-61, 63, 64, 68, 71, 73-77, 80, 81).

Nor can it be said that there was a "termination of employment" within the meaning of the section on page 3a of the policy. The generally conceded interpretation of the phrase "termination of employment" is that there is a complete severance of the employer-employee relationship. [See *Peters vs. Aetna Life Ins. Co.*, 273 NW 307, 279 Mich. 663, (1937)] There should be no question that Joan's departure for school at Stanford in contemplation of attending the fall semester there did not in and of itself constitute a severance of a relationship as a partner in the Cottonwood Lumber Company. The appellant submits that such an absence from the business for schooling purposes was within the contemplation of the subscribing employer, the Cottonwood Lumber Company, and of the appellee insurance company respecting the degree of Joan's activity and did not alter her status as an active partner in contra-distinction to a dormant partner. Evidence that Joan, upon returning from Stanford to Cottonwood, once again resumed her activities in the business substantiates the intent of both employer and employee in this regard. [Whether there was a permanent severance of the employer-employee relationship and not merely a suspension or temporary lay-off so as to end liability of insured under the group policy rested largely upon the intention of the employer. See *John Hancock Mutual Life Ins. Co. vs. Shoun*, 191 S.W. 2d 186, Tenn. (1945)]

Certainly, it is reasonable to assume that if the appellant, as one of the managing partners of the Cottonwood Lumber Company, considered Joan as no longer active in the partnership business, she would have cancelled Joan's certificate of insurance just as she did her father's when he retired from part ownership and activity in the lumber company (R 57, 59).

2. *Under at least one reasonable construction of the provision as set forth below, John E. Medigovich's absence from the business while at Stanford, was an authorized leave of absence which did not extend beyond the three months' limitation. The District Court's failure to give the construction most favorable to the insured was clearly erroneous.*

#### "TERMINATION OF AN EMPLOYEE'S INSURANCE

"An employee's insurance under this policy shall terminate at the earliest time indicated below; without prejudice, however, to any rights to insurance under the section entitled 'EXTENDED INSURANCE'; (a) the insurance of an employee shall terminate thirty-one days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment, except that while an employee is absent on account of sickness or injury, employment shall be deemed to continue until premium payments for such employee's insurance are discontinued. *At the option of the Trustees the insurance of an employee may be continued during a temporary layoff but not beyond the end of the policy month following the policy month in which the layoff starts, or may be continued during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury, but not beyond the period ending three months after such leave of absence starts.*"

There is no question that the Cottonwood Lumber Company partnership consented to Joan's absence from the partnership business for purposes of schooling at Stanford University. Does the above language necessarily require a specific exercise of option by the Trustee, and when under circumstances where the Trustee indicates a general policy to permit the subscribing employer to give such leaves of absence as the employer in his discretion may desire and as is limited by the three months' period (R 31, 32)? Certainly the language itself does not expressly require any affirmative action by either the subscribing employer to the Trustee of the association or by the Trustees to the insurer.

Moreover, the language may be reasonably construed as simply providing that the insurance of an employee may be continued

during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury, but not beyond the period ending three months after such leave of absence starts. Under this construction of course there would be no termination of Joan's insurance as she returned before the period ending three months after such leave of absence started.

The appellant respectfully submits that this latter construction is not only a reasonable one under the circumstances, but is one favored by common sense when we consider that it is a partnership giving a partner a leave of absence rather than an employer giving a true employee a leave of absence.

*3. The record clearly establishes that the appellee insurer with knowledge of Joan's employment character accepted premiums on her behalf up until her death. The failure of the District Court to find that this constituted an estoppel to assert that the status existing at the time of death was not that of employee under the terms of the group policy and certificate was clearly erroneous.*

The record establishes by the testimony of the Trustee, Gus Michaels, that the insurance company, through its agent was apprised of the respective ages of Joan and Billy Medigovich (R 41, 42). The insurance company would be held to have had knowledge of their youth even without imputing the knowledge of its agents to the company, as the amount of premium payments returned to the company would in themselves indicate their youth (See page 6 "Calculations of Premiums" of the master policy, Plaintiff's Exhibit 1 in evidence).

Knowing the ages of Joan and Billy, it is then reasonable to assume that the company would realize that their activities as partners would certainly not be of a managerial character and would of necessity be limited by reason of their youth, experience and time devoted to education.

The record establishes that the insurance company accepted premiums on behalf of Joan up until the time of her death and

accepted premiums on behalf of Billy until the trial of this action notwithstanding the aforesaid knowledge (R 38).

The court's attention is directed to its decision in the case of *John Hancock Mutual Life Ins. Co. of Boston Mass. vs. Dorman*, 108 F.2d 220 . The court will recall that in this case the insured was a member of the board of directors of a bakery corporation and received no pay for his service as director; that under the California Labor Code a member of a board of directors is considered as an *employee* only if rendering actual services for the corporation *for pay*. The insurer denied coverage under its group policy on the ground that the director was not really an employee of the bakery corporation in that he received no compensation for his services. The insurer, through its agent, had knowledge of the employment character of the insured from the outset.

This court held that an acceptance of the premiums by the insurer with knowledge of the insured's employment character constituted an estoppel to assert the status existing at the time of death was not that of employee and that this estoppel applied as well to the contention that the insured was not an employee at the time of the issuance of the policy.

4. *A reasonable construction of the provision set forth below clearly supports the conclusion that the insured was at all times from September 17, 1952, up until the insured's death, eligible as a full-time employee temporarily working on a part time basis within the terms and provisions of the group policy and certificate issued thereunder.*

#### "INSURANCE SCHEDULE

"The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer determined by conditions pertaining to employment as are reported in writing to the insurance company by the Trustee; *provided, however, that part-time employees (but not including full-time employees temporarily working on a part-time basis) shall not be eligible for insurance hereunder.*"

Here again we are faced with language of a typical group policy

which by its nature is designed for the true employer-employee relationship. Including within the policy as insureds partners of a partnership and sole proprietors and designating them as employees, as has been heretofore stated, creates obvious ambiguities when these provisions are applied to these two classifications. By the very nature of the status, is it possible to have in legal contemplation a part-time partner or a part-time proprietor? Applying, however, the language in analogous fashion and resolving any ambiguity in favor of the insured in accordance with settled rules of construction [*Spaun Horst vs. Equitable Life Assur. Soc. of U.S.*, 88 Fed. 2d 849. See also *A. J. Bayless Markets vs. Ohio Casualty Ins. Co.*, 104 P.2d 145, 55 Ariz. 520 (1945)], would it not be a reasonable interpretation to say that Joan was in every sense a full-time employee (partner) who was temporarily absenting herself from the partnership business for schooling reasons?

In the case of *Equitable Life Assur. Soc. of United States vs. Wortham*, 67 F.2d 721, a decision of the Circuit Court of Appeals, Seventh Circuit (1933) the Circuit Court used the following language on page 723 thereof:

"In the case of such an employee, what might reasonably be considered as full time service depends upon the relations and transactions between employer and employee. It is not essential to full time employment that such an employee be regularly and continuously at a particular place such as the employer's office.

Whatever of ambiguity or indefiniteness there may be in the words 'working full time' as applied to such a case can avail the appellant (insurance company) nothing since it chose to employ these words in the preparation of the insurance contract."

If she had applied for insurance on September 17, 1952, could her eligibility for insurance coverage have been denied under the terms of this provision?

The argument may then be urged that eligibility as such only applies as of the date that Joan first applied for insurance some months before July 3, 1952; that it is not of a continuous charac-

ter in its proper connotation. In 14 *Words and Phrases*, page 354, it is said that "etymologically the meaning of 'eligible' is capable of being chosen, and therefore denotes a condition existing at the time of choosing whether by election or by appointment. This is the accurate meaning of the term and the primary definition given by all lexicographers, but in some dictionaries a second definition is given of the word as *legally qualified*. It must also be conceded that often not only colloquially but also in judicial opinions the word is used in the latter sense."

The appellant submits that the insurance company did in fact use the term "eligible" in the sense of being *legally qualified*. On page 3, clause 2, the following language in the policy is used:

"Upon written request from the Trustees to the insurance company that any classes of employees of a subscribing employer be eliminated from the classes of employees eligible for insurance hereunder . . . "

The insurer is speaking of employees already insured or who have been initially certificated as eligible; that upon written request of the Trustee these employees, who have continued to be eligible, shall be eliminated.

Clearly then, Joan E. Medigovich, as of September 17, 1952, was eligible as a full-time employee temporarily working on a part-time basis within the terms and provisions of the master policy and certificate issued thereunder.

### CONCLUSION

With a desire to attain some degree of clarity in the presentation of this matter, the writer has individually or separately attempted to analyze the points raised. It is believed, however, that only by stepping out of the trees and examining the forest from without can the appellant's position be best appreciated.

Let us then examine the following factors as a group without attempting to single out or attach significance to any individual item:

1. A group policy, the language of which was prepared and selected by the insurance company.

2. A certificate of insurance, the language of which was prepared and selected by the insurance company, and which did not contain any provision or provisions apprising the holder of said certificate as to the qualifications respecting his character of employment.

3. The master policy was not issued to the subscribing employer, but to a trustee for an association of employers (R. 33).

4. The insurance company issued certificates of insurance on a seventeen year old girl, Joan E. Medigovich, and a thirteen year old boy, Billy Medigovich, as active partners in the Cottonwood Lumber Company partnership.

5. The insurance company, having knowledge of the ages of Joan and Billy, would be held to know the natural limitations of experience and time devoted to schooling incident thereto.

6. The insurance company accepted premiums on behalf of Joan up until her death and on Billy up to the trial of this action.

7. Joan was a partner with a \$10,000 investment, who was commonly recognized in the community as a partner, and who was active in the partnership business within the limits of her abilities and experience, and save for time devoted to schooling.

8. With respect to Joan's departure for Stanford, the appellant testified that she so advised the trustee, Gus Michaels; Mr. Michaels, however, did not remember of having been so advised (R 29).

9. With regard to the provision relating to leave of absence, the trustee, Gus Michaels, testified:

"Q. Mr. Michaels, may I ask this question then: With respect to partners and with respect to the matter of insurance remaining in force with respect to employees on a leave of absence, if the employer continued to pay the insurance premiums during an allowable

period of absence, did you have any reason or cause for not agreeing to that?

"MR. LESTER: I object to that on the same grounds.

"THE COURT: Same ruling.

"A. Actually that is more a determination of the employer. As long as the bills would go out every month as they do and the insurance is paid every month, I really have no way of knowing whether a man is on leave or not.

"Q. I take it as a matter of general policy so long as the employer is satisfied to pay the insurance premiums, you would be quite agreeable to going along that the insurance remained in force.

"A. Oh, yes." (R 31, 32)

9. The provisions relating to termination of insurance, cessation of employment and leave of absence were provisions manifestly designed for a typical group employee plan and not for partners and proprietors.

10. No inquiries or instructions were directed to the trustee by the insurance company with respect to the degree of activity of Joan and Billy as employee partners of the subscribing employer, the Cottonwood Lumber Company (R. 37-39).

When we lump together the over-all effect of all these circumstances as they related to the seventeen year old insured, Joan E. Medigovich, it seems manifest that we have a situation fraught with possibilities for misunderstanding and misinterpretation.

Certainly we have here a unique situation, to which the usually applicable decisions can only be cited by way of analogy. We first of all have standard employer-employee language applied to a partnership-partner status, with its legally distinct characteristics and consequences. We secondly have a contract of group insurance, not between the insurance company and the employer, but between the insurance company and a trustee for an association of employers. The trustee, under its arrangement with the

insurance company in this instance, acted as a sort of bookkeeper and collection agent for the insurance company (R 26-29, 33-36), though considered as an agent for the subscribing employer (Plaintiff's Exhibit 1 in evidence),

Thus, not only is the insured faced with questions of policy interpretation that would tax a lawyer's understanding, but the insured's agent, the trustee, must also correctly interpret the policy requirements as the insured would be bound by any erroneous interpretation. Obviously, Gus Michaels did not interpret the leave of absence provision to require an affirmative exercise of option or he would not have testified as he did. The insurance company would urge, however, that it is not what Gus Michaels understood but what he should have understood, notwithstanding a provision in the policy whereby the insurance company permitted the trustee to say who was eligible and who was not eligible thereunder. (Clause 1 and 2 on page 3 of the master policy, Plaintiff's Exhibit 1 in evidence)

To permit the appellee to take refuge behind a narrow, refined construction of this master policy when the language and surrounding circumstances were singularly filled with technical pitfalls for the 17 year old insured is to exchange justice and understanding for the precise word or act.

Judgment for the insurance company should be reversed and the cause should be remanded for appropriate action.

Respectfully submitted,

SNELL & WILMER

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